



CW-NJ-001-006

SUPREME COURT OF NEW JERSEY  
DOCKET NO. M-622

RAYMOND ARTHUR ABBOTT, et al.,)	Civil Action
Plaintiffs, )	
v. )	Sat Below:
FRED G. BURKE, et al., )	Hon. Michael P. King, P.J.A.D.
Defendants. )	

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DEFENDANTS' BRIEF IN SUPPORT  
OF THE COMMISSIONER'S RECOMMENDATIONS

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PETER VERNIERO  
ATTORNEY GENERAL OF NEW JERSEY  
R.J. Hughes Justice Complex  
P.O. Box 112  
Trenton, New Jersey 08625  
(609) 984-9504  
Attorney for Defendants

JAYNEE LAVECCHIA  
JEFFREY J. MILLER  
Assistant Attorneys General  
Of Counsel

NANCY KAPLEN  
MICHELLE LYN MILLER  
Deputy Attorneys General  
On the Brief

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT . . . . .	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS . . . . .	4
LEGAL ARGUMENT . . . . .	22
POINT I:	
THE COMMISSIONER'S PROPOSAL FOR IMPLEMENTATION OF RESEARCH BASED, PROVEN EFFECTIVE WHOLE SCHOOL REFORM PROGRAMS THAT COMPREHENSIVELY INTEGRATE SUPPLEMENTAL PROGRAMS WITH REGULAR EDUCATION CURRICULUM IS A CONSTITUTIONALLY ACCEPTABLE MEANS OF MEETING THE SPECIAL NEEDS OF STUDENTS ATTENDING SCHOOLS IN THE ABBOTT DISTRICTS. . . . .	22
POINT II:	
PROGRAMS AND SERVICES RECOMMENDED BY THE TRIAL COURT BEYOND THOSE PROPOSED AS PART OF THE COMMISSIONER'S COMPREHENSIVE AND INTEGRATED WHOLE SCHOOL REFORM MODEL DO NOT HAVE STRONG EMPIRICAL SUPPORT AS BEING EFFECTIVE IN IMPROVING STUDENT ACHIEVEMENT AND THEREFORE SHOULD NOT BE PART OF A COURT-ORDERED REMEDY TO ENSURE A THOROUGH AND EFFICIENT SYSTEM OF FREE PUBLIC SCHOOLS IN THE ABBOTT DISTRICTS . . . .	30
POINT III:	
IN ORDER TO EFFECTUATE THE DESIRED IMPROVEMENTS TO STUDENT ACHIEVEMENT IN THE ABBOTT DISTRICTS, THIS COURT SHOULD DEFER TO THE COMMISSIONER'S IMPLEMENTATION PLAN . . . . .	44
POINT IV:	
THE COMMISSIONER'S CONCLUSIONS AND RECOMMENDATIONS AS TO FACILITIES IN THE ABBOTT DISTRICTS SHOULD BE ADOPTED BY THIS COURT AND THE GOVERNOR AND LEGISLATURE SHOULD BE GIVEN AMPLE OPPORTUNITY TO DECIDE HOW TO ADDRESS THE FACILITIES ISSUES IDENTIFIED BY THE COMMISSIONER . . . . .	53
CONCLUSION . . . . .	58

## TABLE OF AUTHORITIES

### PAGE

### CASES CITED

<u>Abbott v. Burke</u> , 119 N.J. 287 (1990) . . . . .	39
<u>Abbott v. Burke</u> , 136 N.J. 444 (1994) . . . . .	31
<u>Abbott v. Burke</u> , 149 N.J. 145 (1997) . . . . .	<i>passim</i>
<u>City of Pawtucket v. Sundlun</u> , 662 A.2d 40 (R.I. 1995) . . . . .	1, 52
<u>Communication Workers of America, AFL-CIO</u> <u>v. Florio</u> , 130 N.J. 439 (1992) . . . . .	52
<u>F.C.C. v. National Citizens Committee for</u> <u>Broadcasting</u> , 436 U.S. 775 (1978) . . . . .	24
<u>Flanagan v. Department of Civil Service</u> , 29 N.J. 1 (1959) . . . . .	23
<u>Gangemi v. Berry</u> , 25 N.J. 1 (1957) . . . . .	36
<u>Golden Nugget Atlantic City Corp. v.</u> <u>Atlantic City Elec. Co.</u> , 229 N.J. Super. 118 (App. Div. 1988) . . . . .	24
<u>Knight v. City of Margate</u> , 86 N.J. 374 (1981). . . . .	31
<u>Matthews v. State</u> , 187 N.J. Super. 1 (App. Div.), <u>appeal dismissed</u> , 93 N.J. 298 (1982) . . . . .	36

### CONSTITUTION

<u>N.J. Const.</u> (1948) art. VIII, §4, ¶1 . . . . .	4, 22, 36
---	-----------

### STATUTES CITED

<u>N.J.S.A.</u> 18A:7F-16 . . . . .	37, 49
<u>N.J.S.A.</u> 18A:38-1 . . . . .	37

### PRELIMINARY STATEMENT

This Court has reached a crossroad in school funding litigation. The issue squarely presented by Judge King's recommendations is the fundamental question of which branch or branches of government will be determining substantive educational policy in this State as we move into the next century.

Judge King's Report suggests that the Court should take on that role. His recommendations invite the Court into the uncharted territory of judicial oversight of what substantively occurs in school districts, schools and classrooms. Judge King suggests that this Court not defer to the expertise of the Commissioner but rather, despite the inconclusive evidence available, mandate a range of programs and services beyond those recommended by the Commissioner.

Judge King's invitation would take the judiciary out of the courtroom and into the classroom. That would be wrong. It would make real the belief held in some judicial quarters that this Court has overstepped its bounds. See City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) (Rhode Island Supreme Court commenting that "the New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.")

The decision in Abbott IV primarily focused on the equivalent funding issue. This proceeding now focuses on the remaining issue of addressing those unique educational needs. The children now have the Commissioner's extensive research and thinking on this issue.

The Commissioner has recommended an approach to address the needs of disadvantaged students in this state that national experts recognize as "cutting edge." Judge King failed to provide suitable deference to that proposal. In fact, in his 139-page Report, he does not cite to even one case articulating the standard of review he used in reviewing the Commissioner's program. That, too, is wrong.

Longstanding principles of separation of powers and judicial review of agency action provide the necessary guidance and should govern here. On the basis of this record, these principles counsel judicial restraint at this juncture. In the face of an eminently reasonable and record-supported proposal by the Commissioner, it is now time for the Court to step back and allow the Executive Branch to execute this national model of school reform in New Jersey. In the absence of reliable evidence in the record to support a conclusion that the Commissioner's proposal is arbitrary and capricious, this Court should defer to the educational policy determinations of the Commissioner. The Commissioner's research-based proposal and plan for implementation of the mandated supplemental educational programs satisfied the Court's requirement for supplemental programs.

Judge King's invitation to expand the Education Clause beyond its plain language is impermissible and should be declined by this Court. Although the State constitution is a flexible document, it is not so pliable as to fit any program or initiative that a court may seek to impose on the other two branches of government.

This Court is now faced with a crucial decision. It could intrude into the policymaking province of the executive and legislative branches, or accept the Commissioner's recommendations as an appropriate constitutional response. If it chooses the former, it risks undermining the success of the Commissioner's promising proposal as well as public acceptance of any court-ordered remedy for additional funds. Instead, it should endorse the Commissioner's sound proposal and thereby permit an opportunity for the three branches to work cooperatively to improve urban education in New Jersey. This Court should not abandon such an historic opportunity by engaging in unrestrained judicial policymaking at a level unprecedented even within the context of this litigation.

Therefore, we respectfully urge the Court to accept in full the Commissioner's proposal as presented.

### PROCEDURAL HISTORY AND STATEMENT OF FACTS

On May 14, 1997, this Court found the Comprehensive Educational Improvement and Financing Act ("CEIFA") unconstitutional as applied to the Abbott districts. Abbott v. Burke, 149 N.J. 145 (1997) ("Abbott IV"). The decision rested squarely on the Education Clause of the New Jersey Constitution, which states:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

[N.J. Const. (1948) art. VIII, §4, ¶1].

The Court determined that CEIFA was incapable of assuring the constitutionally required educational opportunity for children in the special needs districts and ordered fiscal parity of the Abbott districts to the I and J districts. And, as it determined additional remedial relief was required, ordered the case remanded to the Superior Court, Chancery Division, for further proceedings.

In accordance with the Court's Order, the Commissioner of Education undertook a study of supplemental programs needed to overcome the disadvantages of students in the Abbott districts. This process included a comprehensive survey of the Abbott districts, community meetings to receive input from stakeholders, consultation with experts and intensive review of empirical evidence analyzing various programs designed to improve education for disadvantaged youths, consultation with urban district administrators, examination of existing and operating supplemental

programs in these districts, and development of cost estimates for these programs. D-2 at 3-4. On November 10, 1997, the Commissioner issued his Study of Supplemental Programs and Recommendations for the Abbott Districts ("Supplemental Programs Study") which contained his recommendations for research-based, proven effective programs and strategies to improve student achievement in the Abbott districts, the cost of his recommendations, and a reasonable and effective implementation plan. D-2. The Commissioner also reviewed the facilities needs of the schools in the Abbott districts and issued A Study of School Facilities and Recommendations for the Abbott Districts on November 17, 1997. DF-1.

Between November 17, 1997 and December 22, 1997, the Honorable Michael Patrick King presided over the remand hearing during which the Commissioner presented his analysis of the needed supplemental programs and facilities and plaintiffs presented their response.

### Supplemental Programs

#### A. Whole School Reform

The Commissioner's Study on supplemental programs culminates in one overarching recommendation: to improve significantly student achievement in the Abbott districts, supplemental programs must be implemented through a whole-school reform approach. Tr. (11/17/97) 197:1-22. Whole school reform is meant to change fundamentally a school and the educational program it provides. Whole school reform is not an "add-on" to what a school currently does; rather, it integrates supplemental programs



and strategies with each other and with research-supported approaches to regular instruction in a coherent and concerted effort to improve student achievement. D-2 at 1, 8; Tr. (11/17/97) 34:14-34:24. Experts consulted by the Department of Education, such as Dr. Robert Slavin, Co-Director of the Center for Research on the Education of Students Placed At Risk, agreed with this approach to address the unique needs of disadvantaged students in the Abbott districts. Tr. (11/17/97) 32:8-10, 35:25-36:7.

The Department's vision for whole school reform in the Abbott districts includes an effective educational mission and philosophy, school-based leadership and decision making, a safe and conducive school environment, and research-based curriculum and instruction wherein the school employs a full-time facilitator to assist the principal in providing leadership in the area of research-based curriculum and instruction. D-2 at 26-28. In addition, this vision includes media and technology designed to support the school's research-based approach to teaching and learning, student grouping and extended reading time, organized and continuous professional development, student and family services, and a school-based budget. D-2 at 28-30.

Recognizing that the adoption of and transition to a model of whole school reform is a monumental task requiring sweeping changes at every level, the Commissioner recommended that whole school reform be phased into the Abbott districts. Specifically, each Abbott district would develop a three to five year schedule for phasing in whole school reform across all of its

schools, identifying which schools will be affected in each year.  
D-2 at 31.

1. Elementary School Models

At the elementary level, the Commissioner has proposed Success For All/Roots and Wings ("SFA") as the preferred model of whole school reform to be adopted in the Abbott districts. SFA showed the most promise of enabling students in the Abbott districts to achieve the rigorous Core Curriculum Content Standards. D-2 at 22. This research program, directed toward "at-risk" students in high poverty schools, is based on years of research and effective practices in beginning reading, and an appropriate use of cooperative learning. D-2 at 22; Tr. (11/17/97) 32:22-33:7.

The SFA program was created through a process of "development and evaluation" to find the best strategies and most effective approaches to reading, classroom management, early childhood education and parental involvement -- in short, a "detailed review of what worked with children who were at risk of school failure." Those strategies and approaches were then woven into "a comprehensive plan." Tr. (11/17/97) 36:22-37:6. This "comprehensive" approach to school improvement and student achievement involves changes in every aspect of elementary school organization, instruction and curriculum. D-2 at 22. This approach makes possible the achievement of SFA's dual goals: to prevent children from falling behind and needing remediation and to intervene early and intensively if a student is experiencing

difficulty in achievement. P-6 at 97; Tr. (11/17/97) 37:7-11; Tr. (12/5/97) 222:14-16.

SFA focuses on reading, writing, and language arts, as well as preschool, kindergarten, family support, and tutoring. Roots and Wings refers to the math, science and social studies elements of the program. Tr. (11/17/97) 38:6-8, 38:13-16. Music, art and programs for the gifted may be integrated into the social studies component of SFA. Tr. (11/17/97) 43:10-15.

This program also includes components to assist bilingual students and children at risk of being classified. The philosophy behind the treatment of special education issues in SFA is called "neverstreaming." SFA schools intervene early and intensively with students who are at risk to try to keep them out of the special education system. P-6 at 212; D-3 at 27-29. Empirical findings support the conclusion that SFA both reduces the need for special education services (by raising the reading achievement of very low achievers) and reduces special education referrals and placements. P-6 at 212; D-3 at 27-29. SFA also has a bilingual program entitled "Lee Connigo" which is built on the same principles and uses the same lesson structure and instructional processes. P-6 at 21; D-3 at 22-25.

The Success For All program places a strong emphasis on increasing the school's capacity to relate to parents and to involve parents, as well as health and social service agencies, in solutions to any nonacademic problems students may have. Each SFA school establishes a Family Support Team for this purpose. P-6 at

156. The Family Support Team deals with issues such as attendance concerns, with children who have serious behavior problems, and, for example, children who need eyeglasses or hearing aids. In short, the goal of the Family Support Team is to ensure "that the children are in school ready to learn every day." Tr. (11/17/97) 44:15-23.

Empirically, SFA has demonstrated substantial improvement in student achievement. With individually administered test data on thousands of children in many schools in many districts, SFA is the most extensively evaluated school-wide restructuring program. P-6 at 195. See also D-3 at 12-27. Results of SFA are, on average, consistent. Children at the end of first grade read just under three months better than children in the control schools. By the end of fifth grade, they read an average of slightly more than a year ahead of the matched control schools. P-6 at 201; Tr. (11/17/97) 63:8-14; D-3 at 12-15. "[I]n terms of proven effectiveness, ... Success For All is substantially better validated than any of the other models...." Tr. (11/17/97) 159:24-160:12.

The comparison in Baltimore, Maryland of SFA and control students show that there is a lasting effect of the program into middle school. P-6 at 202. Also, in the Maryland SFA/Roots and Wings pilot program, the four schools began the program performing substantially below the state average on statewide assessment. Within three years, those four schools caught up to the state

average, and in some areas, slightly exceeded the state average. Tr. (11/17/97) 170:4-18; D-3 at 18-20.

In light of the proven ability of the Success For All program to increase the achievement of disadvantaged students, the Department appropriately recommended it be the presumptive model for implementation in all elementary schools in the Abbott districts. Alternatively, elementary schools in these districts may elect to implement other, research-based, whole school reform models including: Comer School Development Program, Accelerated Schools, the Adaptive Learning Environments Model, and the Modern Red School House, or some other model of whole school reform determined to be effective in improving student achievement. D-2 at 26.

Thus, as part of a whole school approach, the Abbott districts would presumptively provide SFA with: (1) class sizes of one teacher for every 21 students in grades K-3 and 1:23 for the remaining elementary grades; (2) one-to-one tutoring for low-performing first, second and third graders; and (3) extended instructional time in reading to 90 minutes per day with a 1:15 ratio for all pupils in grades one through three. D-2 at 12.

## 2. Secondary School Models

Unlike the models of whole school reform at the elementary level, no one secondary whole school reform program appears to be sufficiently empirically validated to enable the Department to identify a preferred model for whole school reform with proven effectiveness for ensuring student success and

improving student achievement. D-2 at 35. Secondary schools should, however, experiment, pilot, and evaluate a range of secondary school models of whole school reform, an approach endorsed by experts such as Dr. Slavin. Tr. (11/17/97) 78:20-23. Promising and innovative models at this level include Project on High Performance Learning Centers, ATLAS, Coalition of Essential Schools and Paideia. D-2 at 35, 54-55, Tr. (11/17/97) 78:9-23, 200:3-8, Tr. (11/18/97) 219:14-24.

Concurrent with this pilot period, the Commissioner recommended the immediate implementation of the following supplemental programs: alternative schools and dropout prevention, small class size remediation, increased security and codes of conduct, school-to-work/college transition programs, instructional technology, continuous professional development, and school-based decision making and parental involvement. D-2 at 35, 36; Tr. (12/9/97) 111:4-15, 115:3-6. These supplemental programs will subsequently be integrated with the model of whole school reform adopted by the secondary school.

### 3. School Based Budgeting and Decision Making

It is well established that whole school reform efforts are more effective and long-lasting when carried out by people who have a sense of ownership and who are closely affected by management decisions. D-2 at 14. The monumental leap from the status quo to the type of whole school reform desired by the Commissioner mandates that a high degree of decision making be undertaken in each and every school in the Abbott districts. This

type of necessary "ground up" reform requires "buy in" by the teachers in each school as well as parental involvement in the day-to-day activities and governance of their children's education. Finally, and perhaps most importantly, it requires school-based budgeting.

Hence, the Commissioner has recommended school-based decision making to be implemented in all Abbott schools: empowering and motivating principals, parents, teachers and students with a common sense of educational purpose. D-2 at 14. School-based budgeting is a necessary component of site-based decision making. It will provide each school with an individualized budget to meet its needs and allow the principal of each school, the parents, and the faculty to make decisions about how to use that money. The school-based budget is "part and parcel of site-based decision making," (Tr. (11/19/97) 71:23-72:6), and assures that funds reach the school level. D-2 at 36. School based budgeting and decision making also complements and assists the proposal of the Commissioner to go "school by school" to determine if sufficient funds are present to support the needed supplemental programs in a given school.

The Commissioner's Study contemplates that transferring decision making and budgeting responsibilities to the school level will be an enormous undertaking. Therefore, the Department of Education will assist each district in the implementation of its plans for school-level implementation. D-2 at 32. The Department will form teams to review the budgets and programs of each school

thoroughly and identify reallocations needed to establish whole-school reform at the school level. D-2 at 32.

The Department's illustrative budget, found in Appendix B of the Supplemental Programs Study, demonstrates a school-based budget contemplated by the Commissioner as part of a whole school reform effort.\* Tr. (11/18/97) 239:22-240:8. The Commissioner relied upon this illustrative budget to determine that sufficient resources currently appear to exist to fund the Commissioner's recommended programs. D-2 at 46-47. Additionally, experts such as Dr. Slavin concluded that the illustrative budget and its assumptions are adequate to implement whole school reform at a "high level." Tr. (11/17/97) 78:5-7.

As demonstrated in the illustrative budget, schools will utilize revenues from various funding streams regardless of how those funding streams are conceived originally so that they work together to support a unified approach at the school level. D-2 at 33; Tr. (11/19/97) 132:9-21. This process is an adaptation of SFA's "zero-based budgeting" wherein all of a school's resources, including Title I, compensatory education, bilingual and special education funds are scrutinized to make effective use of those resources. Tr. (11/17/97) 59:14-60:12. The illustrative budget also provides a basis upon which the Department can make a preliminary determination as to the amount of additional funds

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\* The Commissioner's illustrative budget contemplates the continuation of parity funding for the time being. Tr. (11/18/97) 235:16-20. It should be noted that in the Governor's FY 99 Budget, she recommends that parity aid be continued.



necessary to implement supplemental programs through whole school reform. And, as the Commissioner himself testified, he will request additional appropriations for the Abbott district schools, if needed, after a review of the school and district budgets and after all available funds have been allocated for maximum use. Tr. (11/19/97) 7:16-23.

**B. Additional Supplemental Programs**

In addition to the overarching recommendation for the adoption of a whole school reform model, the Commissioner also recommended the implementation of the following supplemental programs as elements of the comprehensive strategy of whole school reform:

**1. Half-day Preschool for Four-Year Olds**

Consistent with the Success For All model of whole school reform and the Legislature's policy determination in CEIFA to expand the educational mission to four year olds, the Commissioner's Study recommended that a half-day preschool program be offered to all four year olds in the Abbott districts, at a class size of 15 students with one teacher and one aide.

The Commissioner's recommendation for a half-day program for four year olds rests on a significant compilation of scholarly and empirical research which supports one level of preschool prior to kindergarten. Research suggests that well-planned, high quality half-day preschool programs help close the gap between the home and school environments and the educational expectations that lead to academic success. D-2 at 8, 9. According to Dr. Slavin, while it

is not known if there are additive benefits of prekindergarten and full-day kindergarten, he strives to ensure that all children experience at least one or the other in the Success For All program. P-6 at 97-98. Similarly, plaintiffs' expert, Dr. Stephen Barnett recommended that "every child in poverty in the United States ought to be provided with at least one year of quality education prior to school entry in a part-day preschool education program or a full-day developmental child care program rich in cognitive interactions between teachers and children." P-28(emphasis added). See also D-7 (1990 National Education Goals have as a priority at least one year of preschool for all disadvantaged children).

In contrast, there is no research which establishes that a full day of preschool is more effective than a half day of preschool, or that preschool programs that start at age three are more effective than those that begin at age four. Tr. (11/17/97) 51:6-52:3, 124:11-18; Tr. (12/2/97) 54:2-9. Also notable, the Child Parent Center II study, designed to study the long-term effects of variation in age of entry of preschool, "found no advantage for children who entered at age three compared with children who entered at age four." D-8 at 42. Moreover, experts such as Dr. Ellen Frede have found that variations in duration and intensity across preschool programs "are not associated with striking differences in program effects ... it may be that even relatively limited experience of the high-quality preschool

programs offered in these studies was sufficient to set the ... children on a path toward change." D-10 at 122. See also D-9 at 14.

In light of the inconclusive nature of the research on the benefits of preschool for three year olds and full day preschool, the Commissioner limited his recommendation in this area to that which was empirically validated to improve student achievement -- a half-day program for four year olds.

## 2. Full-day Kindergarten

In addition to and in partnership with the Commissioner's recommendation for half-day preschool for four year olds is his recommendation for a full day kindergarten program. Again, the Commissioner's recommendation is firmly rooted in the volumes of empirical research which laud the effects of a full day program for five year olds. Studies have shown that well-planned, developmentally appropriate full-day kindergarten programs for five-year olds clearly provide one of the most cost-effective strategies for lowering the dropout rate and helping children at-risk become more effective learners in elementary school, particularly in first grade. D-2 at 10. Moreover, full-day kindergarten has been found to consistently increase end-of-kindergarten achievement more than half-day programs, although long-term outcomes are less well established. P-6 at 97.

Because full-day kindergarten is a promising approach when incorporated as part of a whole school program, the Commissioner recommended that Abbott districts provide full-day

kindergarten programs for all five-year old children at a class size of 21 with one teacher and one aide. D-2 at 10, 46.

### 3. Reduced Class Size in Reading

In addition to the early childhood programs discussed above, the Commissioner proposed reduced class size in reading for grades 1 through 3. The Commissioner based this recommendation on the compelling evidence that small classes (e.g., 1:15 ratio) for reading instruction in the early grades can be effective, and that the benefits persist when used in conjunction with other modifications to the learning environment to achieve and maintain academic achievement. D-2 at 11. This benefit is further established in the research-based evidence of the benefits of reducing class size in conjunction with Success For All. Tr. (11/17/97) 79:17- 81:13.

According to Dr. Slavin, "to have a full 90 minutes of active, productive, instruction, having only one reading group is essential." Dr. Slavin's SFA approach contemplates cross-grade grouping for reading, which on its own has been found to increase student achievement. D-2 at 12. In practice, students in small groups for concentrated reading periods demonstrate "progress in the areas of reading and language arts" and that ability assists students in "every area" of the educational program. Tr. (12/5/97) 232:17-233:5.

In making this recommendation, the Commissioner reviewed, considered, and ultimately rejected reducing class size in all subjects. While targeted, reduced class size in reading has been

proven greatly effective, the effects and benefits of reducing class size for all subjects -- as found in the Tennessee Star Study -- was characterized by witness Dr. Jeremy Finn as "small." Dr. Finn further testified that he could not make a definitive recommendation to implement reduced class sizes across the board as he considered it to be a "policy question." Tr. (12/2/97) 191:13-193:5.

Thus, after comparing the targeted and structured approach to reduced class size in SFA and its impressive results, (see P-6 at 201), to a program which simply reduces the size of classes for all subjects, achieving "small" effects, the Commissioner reasonably determined to recommend the SFA method of targeted reduced class size and an extended reading period. D-2 at 11.

#### 4. Health and Social Services

Consonant with the Department's mission to educate students in New Jersey, (Tr. (12/5/97) 116:20-25), the Commissioner recommended that Abbott districts provide for the social and health service needs of their students through coordination with social and health care providers, inviting the services into the school or going into the community to link students with services. Tr. (12/5/97) 92:21-93:14.

The Commissioner's Study and the testimony presented by the defendants make plain that the Department of Education does not have expertise in the area of social service delivery. It is the agencies and departments of New Jersey that provide health and human services that are best suited to assist children with those

types of needs. Tr. (11/17/97) 217:2-9. The obvious example in this regard is the Department of Human Services ("DHS") whose basic mission is to serve the disadvantaged individuals of New Jersey, alleviate their suffering and provide them with basic services to address their human and social service needs. Edward Tetelman, Assistant Commissioner of DHS, testified to the department's current involvement in the Abbott districts.

As Mr. Tetelman explained, the Department of Human Services has determined to provide social services to the Abbott districts (and other urban areas) by providing the needed services primarily through the community rather than through the schools. Indeed, Mr. Tetelman testified that Human Services prioritizes how best to provide services and its School Based Youth Services ("SBYS") program is not high on that list of priorities. Tr. (12/5/97) 117:9-16.

As a complement to the social service agencies and departments, the Commissioner recommended a coordination role for the schools. As Dr. Barbara Anderson, Assistant Commissioner of the Department of Education, testified, "[w]e think schools should provide the space. We think that schools should take a very active role in being responsible for referral, in making sure that there is a real coordination of services that those services are integrated." Tr. (11/17/97) 217:10-14.

At the elementary level, this would take the form of an enhanced family support team with both a parent liaison and social worker. Tr. (11/17/97) 217:22-24. At the secondary level, more

variation is expected. The community services coordinator at each middle and high school would "work with resources during the school day, whether it's the nurse or the guidance counselor or any other person to identify the kinds of assistance that a child and/or family may need." Tr. (11/17/97) 218:3-7. The coordinator would also work with local community agencies to bring into the schools the resources and services available through the community, other agencies and departments of state. Tr. (11/17/97) 217:10-218:12.

#### 5. Other Recommended Supplemental Programs

The Commissioner also recommended as supplemental programs the increased use of instructional technology, increased security\* and the adoption of codes of conduct, an emphasis on continuous professional development, alternative education and drop out prevention, and school to work and school to college transition programs. The programs are described in detail in both the Commissioner's supplemental programs study and Judge King's Report.

#### Facilities

In Abbott IV, the Court also directed the Commissioner to "review the facilities needs of the twenty-eight Abbott districts, and provide recommendations concerning how the state should address those needs ... including consideration of appropriate and

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\* The Commissioner's Study assumes an additional cost for these security measures at \$61 per pupil at the elementary level and \$146 per pupil at the middle and high school levels which would fully fund the one elementary security guard as well as the 1:225 ratio at the secondary level. These funds are in addition to the amounts already being spent by the districts for security as reflected in the facilities operation and maintenance budgets. Tr. (11/20/97) 63:7-20.

alternative funding, as necessary." 149 N.J. at 225. The Commissioner's response to that order is set forth in A Study of School Facilities and Recommendations for the Abbott Districts, ("Facilities Study"). DF-1. Therein, the Commissioner described the facilities deficiencies in the Abbott districts identified through the Study's survey and the types of educational spaces needed to provide adequate programs to enable students to meet the Core Curriculum Content Standards. The Facilities Study also outlines a state-controlled management and financing plan to address the facility needs of Abbott districts.

#### Report and Decision of Remand Court

On January 22, 1998, Judge King issued his Report in which he adopts the Commissioner's recommendations. However, he goes beyond those recommendations to include full-day preschool for three and four year olds, summer school for all schools including paid positions for eleventh and twelfth grade students, School Based Youth Services for middle and high schools, and the adoption of an incentive program requiring the payment of bonuses to teachers. It is those additional programs to which the Commissioner takes exception.



## LEGAL ARGUMENT

### POINT I

THE COMMISSIONER'S PROPOSAL FOR IMPLEMENTATION OF RESEARCH BASED, PROVEN EFFECTIVE WHOLE SCHOOL REFORM PROGRAMS THAT COMPREHENSIVELY INTEGRATE SUPPLEMENTAL PROGRAMS WITH REGULAR EDUCATION CURRICULUM IS A CONSTITUTIONALLY ACCEPTABLE MEANS OF MEETING THE SPECIAL NEEDS OF STUDENTS ATTENDING SCHOOLS IN THE ABBOTT DISTRICTS.

Applying his own expertise as well as relying on an extensive body of research and the views of nationally renowned experts in the field of educating disadvantaged children, the Commissioner proposed the implementation of a whole school reform model incorporating certain supplemental programs to meet the special disadvantages of children attending school in the Abbott districts. The Commissioner's proposal integrates a regular education curriculum with the necessary supplemental programs in a model that has been validated by research and proven effective in increasing the academic performance of low-income students. The Commissioner's proposal is a national model for the improvement of urban schools and should be adopted by this Court as an appropriate means of meeting the constitutional requirement in the Abbott districts for "a thorough and efficient system of free public schools." N.J. Const. (1948) art. VIII, §4, ¶1.

In Abbott IV, this Court directed the Commissioner to study the special educational needs of students attending school in the Abbott districts and specify the programs required to address those needs. 149 N.J. at 224. The Court was looking to the

specialized knowledge of the Commissioner to guide the final resolution of the case.

The determination of appropriate remedial relief in the critical area of the special needs of at-risk children and the programs necessary to meet those needs is both fact-sensitive and complex; it is a problem squarely within the special expertise of educators. A court alone cannot, and should not, assume the responsibility for independently making the critical educational findings and determinations that will be the basis for such relief.

[Abbott IV, 149 N.J. at 199].

Thus, consistent with the Court's longstanding doctrine of deference to administrative determinations on matters implicating the special knowledge or expertise of the agency, the Court turned to the Commissioner for his conclusions and recommendations on the issue, providing a forum for plaintiffs to "except" to those findings and conclusions and to attempt to demonstrate the unreasonableness of those recommendations. Abbott IV, 149 N.J. at 225. The Commissioner's recommendations are entitled to a high degree of deference by this Court. As the Court has itself recognized,

If there is any fair argument in support of the course taken [by the agency] or any reasonable ground for difference of opinion among intelligent and conscientious officials, the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal. Doubts held by the court as to the wisdom of the administrator's decision do not alter the case.

[Flanagan v. Department of Civil Service, 29 N.J. 1, 12 (1959).]

This is especially true of determinations which are, as here, "primarily of a judgmental or predictive nature." Golden Nugget Atlantic City Corp. v. Atlantic City Elec. Co., 229 N.J. Super. 118, 126 (App. Div. 1988), citing F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

In complying with this Court's directive, the Commissioner determined that simply adding supplemental programs onto the existing regular education curriculum, even a regular education program funded at the same level as the I and J districts, was not likely to improve student achievement in these poor urban districts. Rather, the only means likely to succeed in fundamentally changing and improving the education being provided in these districts was to completely restructure and refocus the operations of these schools from the bottom up. "[N]othing short of dramatic changes in practice will allow us to achieve that goal." Tr. (11/18/97) 211:13-14.

The Commissioner, therefore, proposed that each Abbott school be required to select and implement one of the various research-proven whole-school designs. In general, this would involve such sweeping changes as (1)creating a site-based management committee of parents and teachers to oversee the school and coordinate parent involvement; (2)providing an effective principal, if the current one is ineffective, through retraining or replacement; (3)implementing research-based curriculum and instructional practices that reflect the state's core standards; (4)retraining teachers to use the model's research-proven teaching

methods; (5)integrating educational technology into the instructional program; (6)providing early education through half-day preschool for four year olds and full-day kindergarten; (7)reducing class size for reading in the early grades; (8)incorporating job training in the high school curriculum; (9)setting up referral linkages with social service agencies; and (10)restaffing the school, through retraining or attrition, to comply with the model's requirements. Based on extensive study and research, these are elements identified by educational experts as critical to improving student achievement in schools with large populations of low-income students.

At the elementary level, Success for All "surfaced clearly as the program of whole school reform that showed the most promise of enabling students in the Abbott districts to achieve the Core Curriculum Content Standards." D-2 at 22. Thus, the Commissioner recommended that SFA be the presumptive choice for all elementary schools. Schools could implement an alternative model at the elementary level only if that whole school reform model was as effective and efficient as SFA.

SFA is "based on years of research and effective practices to ensure that disadvantaged students in high poverty-level schools have the best opportunity to be successful." Report at 32. The elements of the SFA program "are themselves derived from research on reading, writing, early childhood education, school organization, parent involvement, integrated services, professional development, and school change." P-6 at 195. SFA has

a strong emphasis on literacy, the fundamental cornerstone to all educational achievement. The program also incorporates those supplemental programs that have been proven most effective in improving achievement of students at risk of school failure, including reduced class size in reading, one on one tutoring and a family support team.

At the secondary level, no one particular whole-school reform model has sufficient empirical validation for the Commissioner to recommend as the "presumptive" model as he did for the elementary level. However, the Commissioner's proposal urges secondary schools to pilot whole school models while at the same time requiring immediate implementation of the supplemental programs that were determined to improve student achievement. These supplemental programs would then be incorporated in the whole school model that was ultimately selected.

The integration of regular education and supplemental programs in SFA and other whole school reform models is critical to their success. The regular and supplemental strategies are "woven together as a comprehensive system of complementary parts" where "the whole is indeed greater than the sum of its parts." P-6 at 229. Instead of just adding new supplemental programs on top of existing regular education and supplemental programs, whole school reform programs restructure and integrate the entire delivery of educational instruction in the school.

Whole school reform not only rebuilds the educational program from the "ground up" but also reforms the financial

structures through school-based budgeting. In his recommendation, the Commissioner embraced the SFA strategy of zero-based budgeting, which is essential to ensure that "all funding streams currently supporting unrelated programs are combined to create an effective elementary school from the funding mix." Report at 37. As Judge King noted, "[b]y using all available resources, SFA focuses upon improving the quality of the whole school rather than creating another program, separate and apart from what the balance of the school is doing." Report at 36. Only by fiscal as well as programmatic integration can the whole school reform programs recommended by the Commissioner and endorsed by national educational experts succeed.

An approach to education that programmatically and fiscally integrates regular and supplemental programs, such as that provided by SFA and other whole school reform models, has proven to be successful in poor urban schools. These whole school reform models were designed specifically to address the needs of poor urban students and have demonstrated their effectiveness in improving those students' achievement levels. Without question, an integrated approach is more appropriate to meet the regular and supplemental needs of the students in the Abbott districts than any particular program being provided by any one of the I & J districts.

The Commissioner's proposal is comprehensive, based on research and has been proven to result in substantial gains in the

achievement of students at risk of school failure." Moreover, the Commissioner's proposal has gone beyond the minimum requirements of the presumptive model -- SFA -- and has funded SFA (the most expensive of the whole school reform models) at a "high" level. Tr. (11/17/97) 78:5-7; Appendix Report at 5. Dr. Odden, Judge King's own consultant, observed, "the State has taken the best and most solid, research-proven effective, urban district elementary school model in the country and enhanced nearly all its key features. The proposal is a strong, expensive, substantive proposal which could serve as a model for the rest of the country." Report Appendix at 6.

As Judge King recognized, the Commissioner's approach is "entirely consistent with the philosophy of Abbott IV and its precursors." Report at 98. The proposal contains within it the fundamental restructuring of the regular education program in order to enhance its effectiveness for disadvantaged students as well as the needed supplemental programs required for those students to overcome their disadvantages. As such, the Commissioner's proposal

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\* The only program recommended by plaintiffs that has any empirical evidence linking the program to student achievement is that of overall reduced class size in the early elementary grades. Yet, results for SFA exceed those of an overall reduced class size. Compare P-33 and P-34 with D-3; Report Appendix at 18 (Dr. Odden noting that SFA "produces an overall effect that is 2-4 times larger than that of class size reduction per se"). See also Peter Hill and Phillip Holmes-Smith, Class Size: What Can Be Learnt from the Research? (1997), cited in Appendix Report at 17, 18 (concluding that "the improvements gained in student outcomes by reducing class size is at best moderate" and that "one-to-one tutoring seem[s] to yield far greater improvements in student achievement and are more cost effective compared to reduced class size.").

meets the requirements of the Constitution and this Court should defer to the Commissioner's expertise and adopt his proposal in its totality.



## POINT II

PROGRAMS AND SERVICES RECOMMENDED BY THE TRIAL COURT BEYOND THOSE PROPOSED AS PART OF THE COMMISSIONER'S COMPREHENSIVE AND INTEGRATED WHOLE SCHOOL REFORM MODEL DO NOT HAVE STRONG EMPIRICAL SUPPORT AS BEING EFFECTIVE IN IMPROVING STUDENT ACHIEVEMENT AND THEREFORE SHOULD NOT BE PART OF A COURT-ORDERED REMEDY TO ENSURE A THOROUGH AND EFFICIENT SYSTEM OF FREE PUBLIC SCHOOLS IN THE ABBOTT DISTRICTS.

Based on the Education Clause of the New Jersey Constitution, this Court invalidated CEIFA and directed the Commissioner to undertake a study of the special educational needs of students in the Abbott districts and identify the programs essential to meet those needs. Abbott IV, 149 N.J. 145 (1997). Thus, the Education Clause establishes the parameters for any remedial relief in this case.

In assessing what programs were essential for the attainment of that constitutional standard in the Abbott districts, the Commissioner focused on the primary concern identified by the Court -- the actual achievement of educational success in those districts. Accordingly, the Commissioner concluded that only programs that had strong empirical support for their likely effectiveness in improving student achievement could rightfully be considered indispensable to achieving the constitutional guarantee in these districts. Programs without a strong link to improved academic achievement, even if promising from an individual's policy perspective, could not be recommended as part of a court-ordered remedy of a constitutional violation; rather those programs should be considered by the Executive and Legislature as part of their

policy making responsibilities. The Commissioner used the proper legal standard in evaluating the programs that should be included in the court-ordered remedy and this Court should apply the same touchstone: namely record-demonstrated empirical evidence that the remedy ordered will be directly responsible for improving student achievement. To do otherwise would "be an abuse of judicial power" by encroaching on the policy-making functions of the other two branches. Abbott v. Burke, 136 N.J. 444, 455 (1994) ("Abbott III").

As this Court has recognized, the legislative and executive branches are constitutionally responsible to make the policy decisions regarding the programs that schools should be providing.\* Abbott III, 136 N.J. at 453, 455. Only if those branches have clearly failed to provide a particular program that by its absence results in a constitutional deprivation should the Court even consider intervening. Thus, the Court's authority in ordering specific programs is properly limited to those instances where the program or service is essential to meeting the constitutional mandate. Otherwise, the Court should defer to the policy choices and expertise of the other branches of government and not impermissibly transgress "upon powers rightfully belonging to a cognate branch." Knight v. City of Margate, 86 N.J. 374, 388 (1981).

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\* The other branches are not only constitutionally responsible to fulfill this function but also are better suited to do so. The executive and legislative branches are able to continually evaluate whether a particular program is meeting its goals and modify or eliminate programs that are not. Court-ordered programs will continue indefinitely, even if they are not positively affecting the academic achievement of students.

Therefore, this Court's role in the instant proceeding is not, as Judge King suggests, to determine which view "this court might be more inclined to favor," Report at 97, but rather whether the Commissioner's proposal overlooks programs that, unquestionably, are critical and empirically linked to the academic achievement of these students and would therefore be required as part of a constitutional remedy. Inconclusive evidence is simply insufficient to override the legitimate policy choices of the other two branches of government, even under the guise of remedying a constitutional violation.

Judge King failed to apply this standard in reviewing the Commissioner's proposal and in making the recommendations contained in his Report. Rather, Judge King viewed his role as applying "constitutional principles to public policy decision-making," Report at 96-97, and assumed the role of a policy maker rather than a judge, "weighing social costs" and benefits rather than weighing the evidence in light of the appropriate standard of judicial review of administrative agency action. Report at 72. In so doing, he recommended programs that go well beyond what the Commissioner recommended, including all day preschool for 3 and 4 year olds, summer school, School Based Youth Services and teacher merit bonuses. But, this remand was not about Judge King's or any special master's recommendations. It was to provide a forum to examine the Commissioner's proposal, to allow plaintiffs to except to flaws, if any, in that proposal thereby bringing a fully vetted Commissioner's proposal back before the Court. Thus, the Court

should reject Judge King's recommendations with regard to those additional programs.

A. Full Day Preschool Programs

The Commissioner, consistent with the policy decision previously made by the Legislature and Governor and the research-based SFA program, proposed a half day of high-quality preschool for four year olds. D-2 at 8. A year of high quality preschool, whether half day or full day, can be linked to increased student achievement. D-2 at 9; P-28; D-10 at 122; D-9 at 14. This is especially true when that preschool program is coupled with full day kindergarten and a whole school reform model such as Success For All. D-3.

Judge King, however, became apparently personally "convinced that such a program will have a significant positive impact on academic achievement in both early and later school years," Report at 104, and "rejected" the Commissioner's proposal. Based on research that admittedly is "inconclusive," Judge King purports to recommend that the Court order that full day preschool be made available for all 3 and 4 year olds in the Abbott districts funded at the level of \$7900 per student. If all of the 3 and 4 year olds in the Abbott districts decided to participate in the program, the estimated cost would exceed \$347 million.

As plaintiffs' own expert concluded in a recent paper, "[i]n light of the evidence, every child living in poverty in the United States ought to be provided with at least one year of quality education prior to school entry in a part-day preschool

education program or a full-day developmental child care program ...." Steven Barnett, Long-term Cognitive and Academic Effects of Early Childhood Education on Children in Poverty, Preventive Medicine (publication due March 1998, emphasis added) P-28; see Report at 68. Consistent with CEIFA as well as the 1990 National Education Goals, D-7, and the Child Parent Center II study, D-8, the Commissioner proposed just that -- one year of a quality part-day preschool education program. Yet, Judge King "urges a full-day program for all children ages three and four whose parents desire enrollment." Report at 104.

No empirical evidence supports the idea that starting children at age three or making the program a full day rather than a half day will improve student achievement.\* In fact, as plaintiffs' expert has stated, "studies on the effects of age of entry failed to find any significant advantage for children who entered at age three rather than age four." Report at 68, citing W. Steven Barnett, Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes, The Future of Children, Winter 1995, D-8 at 42 (emphasis added). See also E.C. Frede, The Role of Program Quality in Producing Early Childhood Program Benefits, The

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Testifying in support of full day programs for three and four year olds, plaintiffs' expert posited that "people often say that poor kids are two grade levels behind by the time they're in elementary school ... behind the average." Tr. (12/1/97) 141:15-18. Yet, as plaintiffs conceded, there is no research to substantiate that alleged two year gap. Tr. (11/19/97) 193:4-13. Nor is there any indication that if such an amorphous gap was ever demonstrated, it could not be overcome with a quality half-day program for four year olds and full day kindergarten incorporated into a whole school reform model such as SFA.

Future of Children, Winter 1995, D-10 (Dr. Frede noting that "variations in duration and intensity across [preschool] programs are not associated with striking differences in program effects); P-6 at 97-98; Tr. (11/17/97) 51:12-15, 124:11-18; 182:9-14 (Dr. Slavin noting that "nobody has made a direct comparison between half-day and full-day programs or between programs that start at age three and programs that start at age four" and that, while he might like to have full day preschool beginning at age three, he doesn't know if it would result in better test scores). Given the absence of strong empirical evidence on this issue, it is not surprising that when asked what educational programs they would target given finite resources, none of the experts suggested preschool as the first place to focus those funds. See Tr. (12/2/97) 71:1-11 (Dr. Barnett testified that he would focus the funds on "a successful high school dropout program"); Tr. (11/17/97) 83:5-15 (Dr. Slavin testified that he would "improve professional development up and down the line."); Tr. (12/8/97) 120:25-122:20 (Dr. Natriello testified that he could not prioritize among programs but rather would focus the money on one school district).

In light of the available, and admittedly inconclusive, research on early childhood education, the Commissioner's determination to provide half-day programs for four year olds is entitled to substantial deference. His proposal is consistent with the conclusion of plaintiffs' own expert that at least one year of a part-day preschool program be provided. As such, the

Commissioner's determination could hardly be characterized as arbitrary or unreasonable. Given the record evidence at the hearing and applying the appropriate standards for review of agency actions, this Court has no legitimate basis on which to overturn the Commissioner's decision.

Not only is deference to the Commissioner's proposal supported by the record in this case but it also avoids the need for the Court to go beyond the plain language of the Education Clause of the New Jersey Constitution. As previously discussed, that clause provides for "the maintenance and support of the thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. (1948) art. VIII, §4, ¶1 (emphasis added).

In interpreting this constitutional requirement, the Court must be guided by the clear language of the provision. Gangemi v. Berry, 25 N.J. 1, 10 (1957); Matthews v. State, 187 N.J. Super. 1, 7 (App. Div.), appeal dismissed, 93 N.J. 298 (1982). There is no ambiguity in that the Education Clause is limited to providing instruction to children between the ages of five and eighteen. The unequivocal language of the Education Clause simply cannot be interpreted as requiring the State and school districts to reach children above or below that age range.

The specific limitation in the Education Clause to children between the ages of five and eighteen precludes this Court from ordering supplemental programs for children below the age of

five. The State, as a matter of policy, may choose to offer programs to children under five or over eighteen and, in fact, has done so. See N.J.S.A. 18A:7F-16 (Early Childhood Program Aid); N.J.S.A. 18A:38-1 (children above five and under twenty can attend the public schools without charge). However, as a matter of constitutional law, the Court cannot mandate these programs and should not attempt to do so.

#### B. School Based Health and Social Services

Recognizing the non-educational yet significant health and social service needs of children in the Abbott districts, the Commissioner proposed a coordination and referral role for Abbott schools. Thus, each school would have staff to identify the health and social service needs of the students and to link those students with community resources (located either in or near the school) to provide the services. The school, however, would not be responsible for providing the health and social services.\* This proposal was consistent with the views expressed by Dr. Odden that:

The idea is not to have the education system fund all of the services but for the education system to provide an organizational arrangement in which the various social services, usually funded with regular federal, state and country [sic] resources, are provided at one place in or near school sites.

[Report Appendix at 19.]

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\* Judge King suggests that State recognized "that schools must offer health and social support services for this student population." Report at 43. The State, however, made no such concession. As the record demonstrates, the State believes that schools should educate and that health and social service providers should provide health and social services to these children. Tr.(11/17/97) 216:6-217:9.



The Commissioner's proposal strikes the proper balance between keeping schools focused on their mission, the education of students, yet being attentive to the substantial non-educational needs of the students in the Abbott districts. This Court should defer to that balance struck by the Commissioner.

Judge King, however, accepted his expert's recommendation that every middle and high school in the Abbott districts should implement School Based Youth Services, a program operated by the Department of Human Services. In fact, Judge King states that he "is inclined to perhaps a more generous State financial contribution towards school-based health and social services than Dr. Odden." Report at 107. Judge King finds that "[t]he need for these services ... is manifest and the benefits undeniable." Ibid.

The State does not dispute that children residing in poor urban districts have significant needs and may benefit from increased access to health and social services. Yet, "benefit from" does not automatically result in a violation of the Education Clause that can, or should, be addressed by imposing a constitutional requirement upon schools to become providers of health and social services. The school cannot replace all others' responsibilities toward the children in these poor school districts. As this Court has noted,

We realize that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, welfare will make the difference for these students; and that this kind of change

is far beyond the power or responsibility of school districts.

[Abbott v. Burke, 119 N.J. 287, 375 (1990) ("Abbott II") (emphasis added)].

Expecting schools to remedy the social ills of poverty dilutes the schools' emphasis on their constitutional task -- the instruction of students between the ages of five and eighteen.

Judge King, in fact, appears to recognize that his recommendation takes him beyond the realm of Education Clause. He does not (and based on the evidence in the record, could not) conclude these services are essential to meeting the requirements of that constitutional provision. Rather, he concludes, as a policy matter, that the services should "optimally" be provided at the schools but notes that the funding would "be mostly non-educational in character," suggesting the funds be provided by the Department of Health or Human Services "not DOE." Report at 108.\*

The Education Clause of the State Constitution cannot be used by the Court to impose its idea of the "optimal" means of funding health and social service programs. There is utterly no empirical evidence linking the provision of such services in schools to increased academic achievement. Even plaintiffs' witness agreed there is no such empirical research. Tr. (12/3/97) 126:7-11. See also Tr. (12/3/97) 21:21-22:4.

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\* This is an interesting -- and we suggest, improper -- use of judicial power in that it would have the Court order non-parties to provide funding of an activity never before articulated as part of the constitutional requirement for a thorough and efficient system of education, as a matter of policy, not as a matter of constitutional law.

If a "rethinking of government's role in this respect" is needed for "more efficient logistical methods" of providing these services to children, King Report at 107, the Legislature and Governor should be engaged in that policy rethinking; it is not the Court's role to impose that "rethinking" through the guise of the Education Clause. The Court has no such roving commission to restructure the mission of State agencies nor to direct the prioritization of allocated State appropriations.

Both the Commissioner's proposal and Dr. Odden's recommendations, adopted by Judge King, recognize the role of the school as being a link to social services; however, their proposals at the middle and high schools differ in how to provide that link. When dealing with an issue such as the role to be played by the school and how best to provide a link to social services, the Commissioner's decision is entitled to deference absent any competent proof that the Commissioner's proposal is arbitrary, capricious or erroneous.

### C. Summer School

Finding no strong empirical evidence that extending the school year is related to increased performance in student achievement, the Commissioner did not recommend an extended year program such as summer school. However, Judge King, relying presumably on plaintiffs' anecdotal evidence and without any meaningful discussion or any citation to empirical studies, declares summer school to be a "worthwhile investment." Report at 107. He recommends that all schools in all Abbott districts

provide a summer program that would include not only instruction but also recreation programs and paid employment for eleventh and twelfth grade students, at an estimated cost of \$100 million. This recommendation is unjustified in its sweep.

And, Judge King makes this recommendation without any evidence in the record of a real link between summer school and increased academic achievement.\* As Dr. Slavin testified, there are no research studies that indicate summer school will increase student achievement. Tr. (11/17/97) 182:24-183:2. See also Tr. (11/17/97) 127:1-11. Moreover, it is unbelievable that the Education Clause of our State's Constitution supports a constitutional responsibility for schools to provide recreational programs and paid employment to its students during the summer. While, as suggested by Judge King, summer programs may "provide a socially acceptable alternative to unsupervised vacation time" and may take "on increased importance as welfare reform returns more parents to the workforce with its concomitant effect on the supervision of children in those families," Report at 79, that does not mean that the Court may require the schools to provide those programs. This Court has no basis to reasonably conclude that the Education Clause, as a matter of constitutional mandate, requires

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\* Judge King appears to have improperly shifted to the Commissioner the burden to "present evidence that summer school was ineffective or unnecessary" rather than requiring some affirmative proof that summer school is essential to meeting the special educational needs of students in the Abbott districts. Report at 79. However, there is no basis for Judge King to start with such a presumption and his doing so is capricious.

an annual expenditure of \$100 million to support summer instructional, recreational or employment programs.

#### D. Accountability

While both the State and plaintiffs would agree that accountability is a significant component in any effort to reform schools, neither proposed any specific accountability program or expenditure of funds for accountability purposes. Yet, Judge King, relying on the views of Dr. Odden, makes a very detailed and specific recommendation regarding accountability that would include a State appropriation of \$24 million to provide \$1,000 rewards to teachers in improving schools. This proposal should not even be considered by this Court. It was outside of the record presented by the parties and therefore has no record-tested foundation.

Further, Judge King's accountability recommendation improperly asks this Court to sit as a super-legislative policymaker and draft the particulars of an accountability scheme. The State does not dispute that Dr. Odden's accountability proposal, adopted by Judge King in his Report, is one type of approach. However, there are many alternative approaches to achieve the same goal. For example, Dr. Odden appears to favor the Kentucky, distinguished educator, approach to school intervention as opposed to the school intervention law established by the New Jersey Legislature. Report Appendix at 24. The preferable approach to school intervention is a policy decision that should be part of a public dialogue and adopted through the democratic

process; this Court has no authority to substitute its policy view (or the view of one expert) for that of the Legislature.

The elected policymakers in the Legislature and the education experts at the Department should be given wide latitude and discretion to decide the best approach to accountability and whether current accountability measures such as state takeover of failing school districts should be revised or augmented with other strategies. This Court should not order any specific program of accountability nor any expenditure of State funds for that purpose, especially based on the record before it in this case. To do so would be an outright usurpation of the authority to appropriate funds for a preferred public policy. For the remand court to even suggest such action underscores the flawed procedural handling of this "remand" which must be rectified now by this Court for there to be public confidence in the resolution of this decades old dilemma.

### POINT III

IN ORDER TO EFFECTUATE THE DESIRED IMPROVEMENTS TO STUDENT ACHIEVEMENT IN THE ABBOTT DISTRICTS, THIS COURT SHOULD DEFER TO THE COMMISSIONER'S IMPLEMENTATION PLAN.

The Commissioner has proposed an unprecedented, "large-scale change" and "fundamental reform" in the educational programs and fiscal practices of each and every school in the Abbott districts. Tr. (11/19/97) 5:6-7. His proposal is not only consistent with the Court's specific directive to identify the essential educational and educationally-related programs but also with the Court's view that "[o]nly comprehensive and systemic relief will bring about enduring reform." Abbott IV, 149 N.J. at 202. The breadth and scope of the Commissioner's whole school reform proposal is daunting. Successful implementation will require the undivided focus and energy of the Department, the Abbott districts and the schools in those districts. Indeed, a thoughtful, reasonable and thorough implementation plan, as proposed by the Commissioner, is crucial to ensuring that the promise whole school reform holds for disadvantaged children can become a reality. This Court, therefore, should not only adopt the Commissioner's substantive recommendations as to the programs that should be implemented in the Abbott districts but further should defer to the Commissioner's carefully-crafted implementation proposal and provide him with the latitude and authority needed to succeed in that implementation effort.

The implementation approach proposed by the Commissioner is an appropriate balance between expeditious and efficacious

implementation. "The state, the Abbott districts, and key consulting organizations have finite capacity to rebuild ... schools at the needed level of quality." D-2 at 32. As the Commissioner testified,

[O]ur goal is not to do it fast, so much as to do it well. We want high quality. You know, these things have a way of dissolving, and good intentions dissolve into a piecemeal approach, and a careful and conscientious approach, I think, is warranted here.

[Tr. (11/18/97) 224:8-13].

Thus, the Commissioner recommended a three to five year phase-in of whole school reform.

Such a phase-in recognizes the practical realities in implementing whole school reform in 420 schools and the obstacles that might need to be addressed as part of the implementation process such as collective bargaining agreements, ineffective leadership and either passive or aggressive resistance by staff to changes in the status-quo. The phase-in provides sufficient time to meet the "major, major challenge" ahead. Tr. (11/19/97) 218:19-219:1.

Undertaking fundamental changes in the programmatic and fiscal practices of schools is an enormous task, in and of itself, as the State experience in State-operated school districts has demonstrated. However, as testified to by various witnesses, the Commissioner's proposal (and successful implementation of whole school reform) requires the very individuals being asked to change to embrace and be fully committed to that change. The Commissioner, during the phase-in period, must foster the



enthusiasm and consensus necessary for "buy-in" and, only as a last resort, turn to forced measures. This Court's unequivocal support of the Commissioner's proposal is one important component in the essential consensus building process.

During the phase-in period, the Department will be working with each Abbott school to identify the whole school reform program that the school will implement and to assist in developing a school-based budget to support that program. In developing the school-based budget for each school, the Department will review both the programs and funding so that the programs funded are part of a coordinated and integrated instructional approach and funds are not used to support "unrelated practices, maybe even competing practices, supporting different philosophies." Tr. (11/18/97) 220:8-9. Reallocations will be sought within the school's budget and within the district's budget so that all funds are being effectively and efficiently utilized in support of the selected whole school reform program.

Based on an illustrative budget that funds the most expensive whole school reform model at a high level, the Commissioner reached the preliminary conclusion that additional funds do not need to be appropriated to implement his proposal. The remand court's expert concurred with that conclusion:

New Jersey is one of the highest education spending states in the country, and the budget provided to the [Abbott districts] is the average of the highest spending districts in the State. So the base budget, by most comparative standards is high. ... I would have expected substantial opportunity for large scale resource reallocation in [these]

schools, given the high overall budget, and that is what the illustrative school budget in the State proposal shows.

[Report Appendix at 8].

However, the Commissioner testified that if, after all possible reallocations, additional funds are required for specific identified purposes, he will seek those funds from the Legislature, targeted for the specified purposes. This funding approach is preferable to abstractly proposing additional funds and is more responsible vis a vis limited public resources; it permits the identification of efficiencies and ensures accountability in the spending practices of these schools and districts. See Report at 99 ("This whole-school reform from the ground up also may lead to financial efficiencies which could be disclosed only through careful examination of each school (and district administrative) budget.").

This Court should defer to the Commissioner's approach to implementing fiscal reforms and accountability in the Abbott schools as part of his whole school reform proposal. As Justice Garibaldi noted,

Because funding issues are unique to individual school districts, towns, and even classrooms in terms of how funds can be effectively spent to achieve a quality education, the Commissioner is in a much better position than the Court to determine the amount of funds needed to support specific programs. The judiciary neither builds schools nor operates them.

[Abbott IV, 149 N.J. at 213 (Garibaldi, J., dissenting)].

The Commissioner's proposal provides for the availability of adequate funds at the school level supporting those programs and strategies that, based on research, are likely to improve the academic achievement of students. This "affirmative and aggressive action" meets the Supreme Court's directive that the Department ensure that "all education funding is spent effectively and efficiently" in the Abbott districts. Abbott IV, 149 N.J. at 195, 193.

Judge King "strongly endorses" the Commissioner's proposal for whole school reform and "agrees with the State's overall approach for educational and financial reform at the school level." Report at 100, 102. Yet, Judge King then proceeds to recommend additional programs for this Court to order. As discussed supra in Point II, the additional programs recommended by Judge King are not sufficiently linked to improved educational outcomes and therefore should not be ordered by this Court. Just as significant in considering Judge King's additional recommendations, however, is the practical reality -- requiring schools and school districts to take on these additional responsibilities at the same time those schools and districts are already facing the monumental challenges of implementing whole school reform will undermine the Commissioner's efforts at systemic and historic educational reform.

As the Commissioner noted in his testimony with regard to preschool, "if the school ... begins to take on so many things, it may not be a way of doing things better, but really, the illusion

that they're being done because no one institution can do everything." Tr. (11/19/97) 228:1-5. Judge King recommends that schools be required to provide health and social services, summer programs as a "socially acceptable alternative to unsupervised vacation time," and full-day preschool programs for all three and four year olds who want to attend. Implementing these programs on top of the Commissioner's comprehensive proposal for whole school reform will so overwhelm the system that quality implementation will become impossible.

Judge King's early childhood recommendations serve as a perfect example of the problem. At this point in time, Abbott districts are engaged in efforts to phase-in preschool for four year olds and full-day kindergarten as required by CEIFA. N.J.S.A. 18A:7F-16. Yet, Judge King recommends that full-day kindergarten programs "be implemented immediately" and that full-day preschool programs for three and four year olds "be implemented promptly, by the 1998-99 term, if at all possible." Report at 104, 105. If Judge King's preschool recommendations are accepted by this Court, the Abbott districts could see an enrollment increase in September of more than 44,000 students.\* This would require the Abbott districts to hire approximately 2933 teachers and 2933 aides and to

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\* Although Judge King recommends that all three and four year olds be provided the opportunity to attend full day preschool, he estimates that only 75% of the eligible students will take advantage of that opportunity. Judge King does not disclose the basis for this estimation. Presumably, for planning purposes, districts will need to prepare for 100% participation until definitive numbers can be ascertained.

find or construct space for 2933 classrooms.\* The State, the Abbott districts and the schools simply cannot accomplish this herculean task even if they devoted all of their efforts to it; expecting them to implement a high-quality full-day preschool program for all three and four year olds (and School Based Youth Services, and summer school programs) along with whole school reform is simply unrealistic.

Judge King's expansive recommendations serve to underscore the need to rely on the knowledge and expertise of the Commissioner to reform the Abbott schools. "I think the point of whole school reform is to identify, and not in a piecemeal way, what is the collection of approaches that are the ones that are responsible, specifically, for yielding [high academic achievement]." Tr. (11/19/97) 163:13-18. Under the Commissioner's proposal, each school will be implementing a whole school reform model which combines, in a comprehensive approach, those elements and components of regular education and supplemental programs that research has shown are effective in improving student achievement. To pile on top of that model other programs that may not enhance student achievement and could detract from the model's successful implementation will be counterproductive to the Court's stated goal of "comprehensive" and "enduring reform." Abbott IV, 149 N.J. at

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\* The Commissioner has recommended class sizes in preschool of 15 students per class with each class having a teacher and an aide. Accordingly, the 44,000 three and four year olds will require 2933.3 teachers, aides and classrooms ( $44,000 \div 15 = 2933.3$ ).

202. For this reason as well, the Court should not order any programs in addition to those recommended by the Commissioner.

Finally, this Court should also reject the invitation by Judge King to interject itself into the Commissioner's oversight of the implementation of whole school reform. For example, based on "virtually universal intuition" that "smaller is better," Judge King suggests that the Court mandate the "prompt" implementation of "class size reduction to fifteen from kindergarten to third grade" if a whole school reform model is not "vigorously and successfully pursued." Report at 106. This gratuitous anticipation of failure is unwholesome to the respect the three branches should be demonstrating one another -- particularly now if success of the children is the goal of us all. This Court should rely on the Commissioner's oversight of the implementation process and expertise. His actions with regard to particular districts or schools may thereafter be reviewed. This typical judicial structure is the appropriate review process for a particular school or district that does not effectively implement whole school reform. The Court should not usurp the Commissioner's authority

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\* Other examples are Judge King's invitation to the Court to order sufficient funding for special education purposes and appropriate art and music programs and facilities and to order supplemental funding for undefined additional security needs. Report at 101, 109. The Commissioner assured the remand court that adequate funds would be available at the school level to fund the necessary programs and services. While Judge King states that he takes the Commissioner "at his word on this point", Report at 101, he intimates that this Court should not when he suggests that the Court might need to enter such collateral orders.

and proper role by establishing, in the abstract, the consequences of such a failure.

The Commissioner has proposed an approach which "represent[s] the cutting edge of re-engineering school finance to the purposes of standards - and school-based education reform, the objective of which is teaching all students, including low income students, to high standards." Report at 102, quoting Report Appendix at 5. The Commissioner has not only faithfully and comprehensively responded to the letter of the Supreme Court's directive but to the spirit of that directive as well. This Court should whole-heartedly and completely endorse the Commissioner's "cutting-edge" proposal and give him the opportunity to successfully implement his recommendations rather than accepting Judge King's invitation to micro-manage the details of that implementation.

Micro-management of the Executive Branch has been denied to the Legislature, Communication Workers of America, AFL-CIO v. Florio, 130 N.J. 439, 461 (1992), it should not be aggregated into the Judiciary -- a branch that is singularly unsuited for such a role. See City of Pawtucket v. Sundlun, supra, 662 A.2d at 59. To do otherwise would not only intrude upon the legitimate functions of the Executive Branch in carrying out its constitutional responsibilities but risks diminishing the opportunity for successful and comprehensive reform in the Abbott districts.

#### POINT IV

THE COMMISSIONER'S CONCLUSIONS AND RECOMMENDATIONS AS TO FACILITIES IN THE ABBOTT DISTRICTS SHOULD BE ADOPTED BY THIS COURT AND THE GOVERNOR AND LEGISLATURE SHOULD BE GIVEN AMPLE OPPORTUNITY TO DECIDE HOW TO ADDRESS THE FACILITIES ISSUES IDENTIFIED BY THE COMMISSIONER.

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In Abbott IV, the Court directed the Commissioner to "[r]eview the facilities needs" of the Abbott districts and "provide recommendations concerning how the State should address those needs." 149 N.J. at 225. In response to that directive, the Commissioner undertook a comprehensive assessment of the existing facilities in the Abbott districts and the cost of remediating the deficiencies in those facilities. Moreover, the Commissioner consulted with national experts as to the effect of the Core Curriculum Content Standards on facilities needs. Finally, the Commissioner recommended a more in-depth survey of the facilities than had been permitted in the time allotted for the study and presented an option for financing facilities improvements for consideration by the Governor and Legislature while the more detailed facilities survey was completed.

The Commissioner's facilities study meets the directive of this Court and this Court should forego any further intervention at this time. Rather, the Court should permit the Commissioner to proceed with the more detailed review of the facilities needs of the Abbott district schools while providing the Governor and Legislature ample opportunity to consider various funding mechanisms for implementation.



As Judge King noted, the facilities assessment conducted by the Department of Education through architectural and engineering consultants, i.e. the Vitetta Group, was "extensive" and provided "valuable details about the condition of existing facilities in each of the Abbott districts." Report at 119. The Vitetta assessment projected an estimated cost of \$1.8 billion. However, as noted in that assessment, to some extent the \$1.8 billion both understates and overstates the actual costs of improvements. For example, the assessment does not include the costs of general conditions, soft costs, special project requirements like site acquisitions or estimated contingencies. DF-2 at 3. On the other hand, the assessment includes costs to correct certain code deficiencies such as heating, ventilation and air conditioning that might not be required. Id. at 2. See also Report at 122. Thus, while the Vitetta Assessment provides valuable information on the current state of facilities in the Abbott districts, that "survey alone is not a sufficient basis for estimating the cost of facilities improvements in the Abbott districts. Stephen Carlidge [the Director of Educational Facilities Programs at the Vitetta Group] testified that a full study [of each individual school district] could not have been completed in the time allowed." Report at 124.

A detailed facilities survey of each district and each facility in the district must be undertaken. Moreover, "difficult" and "site-sensitive" decisions such as renovation versus rehabilitation, "best" use of existing space, potential grade

reconfigurations, changes in school sending areas or school sizes need to be fully explored, openly debated and resolved. Report at 122. The Commissioner has established timeframes in which this phase of the implementation process will occur. DF-1 at 37-38. At the end of the process, each district will have a comprehensive facilities management plan that addresses all of its facilities needs and a time schedule for implementing the necessary improvements.

In preparing its facilities study, the Department retained three national experts. All three experts met with Department staff and were asked to assess the effect of the Core Curriculum Content Standards on facilities. Their conclusion was that there was very little effect. DF-11. To the extent an effect was identified, the Commissioner incorporated those facilities requirements into his minimum standards. DF-1 at 17-19; Tr. (12/12/97) 38:24-39:3.

The experts concluded, and plaintiffs witnesses did not dispute, that "[t]here appears to be no empirical research that directly establishes a cause and effect relationship or correlation between academic performance and the presence, absence or configuration of specialized spaces, provided that these facilities provide a clean, safe and functional environment which is conducive to learning." DF-1 at 16. Thus, the facilities standards adopted by the Commissioner (which will incorporate those spaces deemed essential by the national experts consulted by the Commissioner) should not implicate the ability of students to achieve the Core

Curriculum Content Standards and thus no constitutional review of those standards is required. Rather, this Court should defer to the technical expertise of the Department in developing the standards.

While the more detailed facilities survey of each school in each district is being undertaken, the Governor and Legislature will have the opportunity to focus on the financial aspects of improving school facilities in the Abbott district. The Commissioner, recognizing the limitations of his expertise in this area, reviewed present practices in other states and proposed an approach to incorporating the "best practices" of other states into a comprehensive financing mechanism in New Jersey. DF-1 at 33. The proposal was offered as "a guide [to the Legislature and Governor] to what is being done by other states and what might be successful in New Jersey." Id. at 34.

The Commissioner's proposed financing mechanism uses an authority such as the New Jersey Education Facilities Authority ("NJEFA") to centralize the issuance of local bonds. By centralizing the bond issuance, a lower interest rate should be attainable and issuance costs should be reduced. In addition, the NJEFA could serve an oversight function during construction to ensure efficient and satisfactory performance. This oversight would include the NJEFA (1) serving as construction manager for all projects; (2) reviewing and approving requisitions for disbursement and construction contracts; and (3) reviewing bidding procedures and coordinating and requiring joint bidding. Finally, the

Commissioner proposed full State funding of the debt service for efficient, necessary school construction. No legislative review of the various ways in which this issue can be tackled has yet occurred -- and this must occur because any centralized solution implicates legislative action.

As the Commissioner stated, his proposal "is just one example of many funding mechanisms which may be successfully implemented by the Governor and Legislature to address this most pressing problem." Study at 33. In the Commissioner's view, "[i]t is likely that a successful program could be structured without all of the above elements or with elements quite different from those indicated above." Ibid.

This Court should provide the Governor and the Legislature ample time and wide-ranging discretion as to how to approach the highly technical and complex facilities financing issues raised by the Study, especially given the huge infusion of public funds necessary to address the facilities needs in the Abbott districts as well as statewide. Judge King does not make any specific recommendations as to the Commissioner's facilities proposal. This Court should likewise permit the Commissioner's recommendations for the preparation of facilities management plans for each of the Abbott schools to proceed while the Legislature and Governor address the fiscal implementation aspects of the problem. No further directives from this Court on the issue are necessary nor warranted at this time.

CONCLUSION

For the foregoing reasons, this Court should reject Judge King's recommendations to require programs in the Abbott districts beyond those recommended by the Commissioner and should adopt in total the Commissioner recommendations regarding supplemental programs and facilities.

Respectfully submitted,



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Peter Verniero  
Attorney General of New Jersey

Dated: 2-13-98